No. 10,381

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES W. BUTLER, et al.,
Appellants,

vs.

GRACE APPLETON McKEY,
Appellee.

OPENING BRIEF FOR APPELLANTS.

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JURISDICTION.

This is an appeal from that portion of the order of the District Court of the United States for the Northern District of California, Southern Division, entered on the 5th day of December, 1942 (Transcript of Record, page 91), which provides that the judgment by default by the clerk of the above-named District Court entered on April 18, 1939 be vacated, that service of summons upon Appellee be quashed and that Appellants' motion to file affidavits of Leo K. Gold and James P. Lavelle be denied.

On November 19, 1936 Appellants herein filed a complaint in the said District Court on behalf of themselves and all of the creditors of the Woodlawn Trust

and Savings Bank, a banking corporation organized under the laws of the State of Illinois. The complaint was a representative suit based upon statutory stockholders' liability against a number of defendants, including Appellee, all of whom had formerly been, or were at the time the said banking corporation became insolvent, shareholders of the above-named Woodlawn Trust and Savings Bank.

All of the plaintiffs were citizens and residents of states other than California. All of the defendants, including Appellee, were citizens and residents of the State of California at the time of the filing of the complaint. (Par. 2 of the complaint, Tr. page 4.) It is admitted that at the time of the filing of the suit Appellee was a resident of the Southern District of the State of California. (Tr. page 76.) Others of the defendants were residents of the Northern District of the State of California. (Tr. page 34.) The total amount involved in the complaint was in excess of $3000; likewise the amount claimed in this representative suit against the Appellee individually was in excess of said jurisdictional amount. Hereafter at pages 41 et seq. we will demonstrate that the requisite jurisdictional amount was involved in this suit and that Appellee as a resident of the Southern District of the State of California could be sued in the District Court for the Northern District of the State as a co-defendant with other defendants in this suit who were residents of the Northern District.

The jurisdiction of the District Court was invoked upon diversity of citizenship, under Section 24 of the

Judicial Code; 28 U. S. C. A., Section 41. Venue as to Appellee was based on Section 52 of the Judicial Code; 28 U. S. C. A., Section 113.

The Appellate jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, 28 U. S. C. A., Section 225(a).

The order of the District Court vacating the judgment entered on April 18, 1939 was made and entered more than three years after the entry of the judgment and therefore after the expiration of the term of Court or long after the six months' period prescribed in Rules 55(c) and 60(b) of the Rules of Civil Procedure.

An order vacating a judgment after the expiration of the term of Court during which the judgment was entered, or after the six months' period above referred to, is appealable as a "final decision" under the above provision of the Judicial Code.

Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013;
Jackson v. Heiser, C. C. A. 9 (1940), 111 Fed. (2d) 310.

That part of the order of the District Court whereby service of summons upon Appellee was quashed is merely expressive of an element of the decision vacating the judgment. The Court apparently vacated the judgment because it considered the service of summons defective. Where the Court simultaneously quashes the service of summons and vacates the judgment which has been entered upon such service of summons, the way must be open to plaintiff to include in the

appeal from the order vacating the judgment that part of the order which quashes the service because such order, although in form an order to quash is in fact part of the final decision.

Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516, 67 L. ed. 372.

That part of the order of the District Court denying permission to Appellants to file the affidavits of the Messrs. Gold and Lavelle as supplementary proof that the prerequisites of service by publication were present and complied with, is also part of the order vacating the judgment and therefore appealable as part of such order. If the District Court had allowed Appellants to file such supplementary proof, the Court upon examination of that supplementary proof might have been fully satisfied that the facts for publication of summons were present. By denying Appellants' motion to file supplementary proof, the Court in effect made an order which formed part of its final decision to vacate the judgment. At any rate, the Court's decision denying Appellants' motion to file supplementary proof, whether in and of itself an appealable order or not, is *reviewable* upon the appeal from the order vacating the judgment.

STATEMENT OF THE CASE.

On April 18, 1939 a default judgment was entered by the clerk of the District Court against Appellee upon her statutory liability as a stockholder in the Woodlawn Trust & Savings Bank, an Illinois banking

corporation, in the sum of $110,886.63, together with costs. (Tr. page 67.)

Subpoena could not be served upon Appellee because the United States Marshal, after diligent search, was unable to find her. (Tr. pages 36-37.) After the United States Marshal had returned the subpoena unserved, alias subpoena was issued (Tr. page 43) and upon Appellants' motion Leo K. Gold was appointed to effect service of the alias subpoena upon Appellee and other defendants. (Tr. page 42.)

In the order by which Gold was appointed to serve process, the Court said (Tr. page 42):

> "It appearing to the satisfaction of the Court that after diligent search, the United States Marshal for the Southern District of California has been unable to effect service upon certain of the defendants * * * namely * * * Grace Appleton McKey * * *."

Leo K. Gold was also unable to serve process upon Appellee. (Tr. pages 47 et seq.) Thereupon Appellants moved for publication of subpoena upon the grounds that Appellee being a resident of the State of California, after due diligence could not be found within the State, and that Appellee concealed herself to avoid service. For proof of the facts for publication of service Appellants relied on the record and submitted an affidavit of Fred S. Herrington, one of the attorneys for Appellants.

The Court, upon Appellants' motion, made an order for publication of summons (Tr. page 60), and stated

therein that it appeared to the satisfaction of the judge from the affidavit of Fred S. Herrington (Tr. page 46) and from other evidence, that a subpoena *ad respondendum,* and also an alias subpoena *ad respondenum,* had been duly issued out of the Court and that diligent search had been made for Appellee in order to serve said subpoena and said alias subpoena upon her, and that Appellee could not, after due diligence, be found within the State of California or the jurisdiction of the Court and that Appellee had been and was concealing herself to avoid the service.

After said order for publication of summons, Appellants took all steps prescribed under the statutes of the State of California to serve Appellee by publication of summons, and upon due proof of all steps necessary default judgment against Appellee (Tr. page 67) was entered. In the recitals of the judgment it was said:

> "The defendant, Grace Appleton McKey * * * having been duly and regularly served with summons and having failed to appear, plead or otherwise defend against the complaint of plaintiffs * * *"

More than three years after the entry of that judgment, Appellee submitted to the District Court a motion to dismiss the action and to quash the service of summons upon Appellee (Tr. page 69), upon the following grounds:

First: To dismiss the action on the ground that the action was in the wrong district because Appellee was

not and had not been an inhabitant of the Northern District of California;

Second: To quash the service

(a) Because the Court had no jurisdiction to order or approve service of summons outside its district; and

(b) Because the order of the Court directing publication did not comply with Section 412 of the Code of Civil Procedure of the State of California, in that the alleged facts in the affidavit for publication of summons of Fred S. Herrington, upon which the order was based, were predicated not upon the affiant's knowledge but upon hearsay; and

(c) Because the order of the Court directing publication of summons did not direct the depositing in the postoffice of a copy of the summons and complaint directed to Appellee at her place of residence.

Third: To dismiss the action on the ground

(a) That the action was barred by the Statute of Limitations;

(b) That the Court had no jurisdiction because the cause of action alleged in the complaint did not exceed the sum of $3000.

Before the hearing of Appellee's motion the Appellants filed a motion with the District Court (Tr. page 78), in which they submitted affidavits of Leo K. Gold, the person especially appointed by the Dis-

trict Court to serve the alias subpoena, and James P. Lavelle, Deputy Marshal of the United States District Court for the Southern District of California, Central Division, requesting permission to file those affidavits as supplementary proof to show that all facts prerequisite for an order of publication of summons were present and complied with at the time when the order of publication of summons was made. (Tr. page 78.)

THE QUESTIONS INVOLVED.

(a) Can the District Court for the reasons upon which Appellee's motion is based vacate a judgment in absence of a motion to that effect?

(b) Is an attack on a default judgment made after the expiration of the six months' period prescribed in Rules 55(c) and 60 (b) of the Federal Rules of Civil Procedure a collateral attack and therefore subject to the limitations which are applicable to collateral attacks?

(c) Can the judgment be collaterally attacked upon the allegation that the affidavit for publication of summons contained defects concerning the mode of proof?

(d) Is it an abuse of the discretion of the District Court to deny the right to amend the proof of facts existing at the time the order of publication was made, if the amendment relates to the mode of proof as distinguished from the introduction of new material facts?

(e) In a collateral attack on a judgment, are the recitals in the judgment binding and conclusive as to the fact of service?

(f) Was the proof of the facts upon which publication of service was ordered sufficient under the California practice?

(g) Is a defendant who has concealed herself to avoid service estopped to allege defects of service by publication?

(h) Under California practice is an order for publication of service valid which does not direct service by mail, where the publication is ordered against a resident of the State upon the grounds that defendant cannot be found within the State and conceals herself to avoid service?

(i) Can absence of the jurisdictional amount render a federal judgment a nullity and make it subject to collateral attack?

(j) Does the representative suit of Appellants, creditors of an Illinois bank, brought against Appellee as one of several shareholders and defendants under the Illinois Banking Act, involve more than the jurisdictional amount of $3000, although each individual appellant would receive less than $3000, if the aggregate amount of the action is more than $3000 and the individual liability of the defendant herself exceeds $3000?

(k) Can a suit on shareholders' statutory liability be brought in the Northern District of California against a defendant shareholder who resides in the

Southern District of California, if co-defendants are residents of the Northern District?

(l) Did the District Court have jurisdiction to quash service of summons after the judgment had become final?

(m) Was the District Court's order erroneous, inconsistent and ambiguous because it ordered service of summons quashed and the judgment rendered upon such service vacated and simultaneously defendant was ordered to file her answer?

(n) Did Appellee submit herself to the jurisdiction of the District Court and waive the right to contend that improper service was made, when in her motion she pleaded matters concerning the merits of the case and the Court's jurisdiction of the subject matter as distinguished from jurisdiction of the person?

SPECIFICATIONS OF ERRORS UPON WHICH APPELLANTS RELY.

The Appellants specify as errors (Tr. pages 98-99):

(a) that the order herein appealed from as to that portion thereof wherein and whereby the judgment entered against said Appellee Grace Appleton McKey, is vacated, was made in the absence of a motion of Appellee to vacate said judgment;

(b) That the District Court had and has no jurisdiction upon a motion to vacate a final judgment entered in a prior term of the Court if six

(6) months have expired after the entry of such judgment, as is more particularly described and defined in Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure;

(c) That even assuming the existence of such jurisdiction in the Court, there were not sufficient factual or legal grounds warranting the Court's order vacating said judgment;

(d) That the District Court had no jurisdiction to quash service of summons after the judgment by default had become final, and that even if such jurisdiction did exist there were no factual or legal grounds warranting the Court's action quashing service of summons;

(e) That Appellants were entitled to file the supplementary affidavits of Leo K. Gold and James P. Lavelle in accordance with their motion, and that said affidavits eliminated all possible doubts as to the validity of the service of summons made upon the Appellee.

(f) That Appellee, by making her motion to dismiss the complaint herein and pleading matters concerning the merits of the case and the Court's jurisdiction of the subject matter of the complaint, and by participating in the hearing upon said motion, waived the right to have the service of summons quashed and thereby voluntarily submitted her person to the jurisdiction of the District Court.

ARGUMENT.

I.

THE DISTRICT COURT WAS IN ERROR IN VACATING THE JUDGMENT IN THE ABSENCE OF ANY MOTION TO THAT EFFECT.

Appellee's motion upon which the District Court vacated the default judgment was to the effect that the action as to her should be dismissed for lack of jurisdiction of the person and of the subject matter and because the action was barred by the Statute of Limitations. (Tr. pages 69-71.) Appellee further moved to have service of summons quashed. (Tr. pages 69-71.)

Notwithstanding that no motion was made to vacate the judgment, the Court's order did vacate the judgment.

Rule 55(c) of the Rules of Civil Procedure provides that a default judgment can be set aside only for good cause shown and Rule 7 (b) prescribes that applications to the Court must be made by motion in writing unless made during a hearing or trial.

As the default judgment was vacated in the absence of any proper motion to vacate the judgment (assuming Appellee was entitled to make such motion), the order of the Court was in error because of the fact that the judgment was vacated in the absence of any motion to that effect, the Appellee apparently proceeding on the theory that the judgment was an absolute nullity and could be entirely ignored.

II.

EVEN IF A PROPER MOTION TO VACATE THE JUDGMENT HAD BEEN MADE, THE DISTRICT COURT HAD NO JURISDICTION TO VACATE THE JUDGMENT, SINCE MORE THAN SIX MONTHS HAD ELAPSED SINCE ITS ENTRY.

The default judgment was entered by the clerk of the District Court on April 18, 1939 (Tr. page 67), and Appellee's motion on which the judgment was vacated was filed more than three years thereafter on July 23, 1942. (Tr. page 77.)

The motion provided for in Rule 55(c) of the Rules of Civil Procedure to set aside a default judgment must be made within the period prescribed in Rule 60(b), that is, within six months after entry of judgment. The six months' period has taken the place of the former rule that to vacate a judgment the motion would have to be made within the same term of Court, so that after the expiration of the six months' period the Court loses its power to set aside its own judgment.

See

Reed v. South Atlantic Steamship Co. of Delaware, Dept. Just. Bull. No. 155 (1942).

As to the law prior to the Federal Rules of Civil Procedure, we refer to *Jackson v. Heiser,* supra; *Phillips v. Negley,* supra.

It is settled by the overwhelming weight of Federal authority that the so-called "Conformity Act" (28 U.S.C.A. Sec. 724) applies only to the mode of procedure up to final judgment and that the authority of the Federal Courts to thereafter set aside their

own judgments is to be decided only by Federal law and not by the law of the state in which the Federal Court sits. In support of this proposition we refer to the case of *Bronson v. Schulten,* 104 U. S. 410, 26 L. ed. 797, where the Court said:

> "The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate and modify its final judgments after the term at which they were rendered, and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts."

This language from Mr. Justice Miller's opinion in the *Bronson* case, supra, has become the settled rule of law. It is followed by the U. S. Supreme Court in *United States v. Mayer,* 235 U. S. 55 at page 69, 59 L. ed. 129 at page 136, where many other Federal authorities to the same effect are collected. We also refer to note 182 in 28 U.S.C.A., Sec. 724, wherein it is said:

> "After the term has ended all final judgments and decrees of the court pass beyond its control unless steps be taken during that term by motion or otherwise to set aside, modify or correct them; and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision. The question relates to the power of the courts and not to the mode of procedure, and state statutes and decisions on the point are not binding."

Judgments of Federal Courts, even if jurisdiction was lacking, are reversible upon appeal or other proper proceedings, but they are not absolute nullities.

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 378, 84 L. ed. 329, 334;

Stoll v. Gottlieb, 305 U. S. 165, 93 L. ed. 104, 111;

Noble v. Union River Logging Co., 147 U. S. 165, 37 L. ed. 123.

The principle that Federal judgments are not absolute nullities even if jurisdiction was lacking, and that they must be attacked by proper proceedings as prescribed by Federal law and precedent, does not necessarily lead to the conclusion that the expiration of the six months' period (as provided in Rules 55(c) and 60(b) of the Rules of Civil Procedure) leaves the party against whom the default judgment was entered without any relief. In proper cases such party may file an independent suit in equity to obtain relief from such a judgment. This remedy is expressly provided by Rule 60(b) of the Federal Rules of Civil Procedure. But we are not here concerned with the question whether the Appellee could have filed such independent suit in equity; Appellee cannot in the present proceeding be relieved from the judgment, for the reason that after the term of Court has expired (as formerly held), or after the expiration of the six months' period now prescribed by the Rules of Civil Procedure, there is no way to have a

Federal judgment vacated except by an independent action in equity.

In *Noble v. Union River Logging Co.,* supra, and *Stoll v. Gottlieb,* supra, the United States Supreme Court made an express distinction between strictly jurisdictional facts and quasi-jurisdictional facts, to the effect that as to the first type of facts a judgment may be collaterally attacked, and as to the second it may not. We need not discuss the question whether, after expiration of the six months' period under the Federal Rules of Civil Procedure, a motion would be sufficient where there is a lack of *strictly* jurisdictional facts, since the jurisdictional facts claimed by Appellee and urged upon the Court are merely *quasi*-jurisdictional as defined by the decisions of the United States Supreme Court just cited.

III.

EVEN ASSUMING THAT THE DISTRICT COURT HAD JURISDICTION TO VACATE ITS OWN JUDGMENT EITHER UPON MOTION OR IN ABSENCE OF ANY MOTION, THERE WAS AND IS NO SUFFICIENT BASIS EITHER IN FACT OR LAW WARRANTING THE COURT'S ACTION IN VACATING THE DEFAULT JUDGMENT.

(1) AN ATTACK ON A DEFAULT JUDGMENT MADE AFTER THE EXPIRATION OF THE SIX MONTHS' PERIOD PRESCRIBED IN THE FEDERAL RULES OF CIVIL PROCEDURE IS A COLLATERAL ATTACK AND THEREFORE SUBJECT TO THE LIMITATIONS WHICH ARE APPLICABLE TO COLLATERAL ATTACKS.

Although Federal law and practice and not State law are determinative of the jurisdiction of the Fed-

eral Court to set aside its own judgment, the fact that Rule 60(b) of the Rules of Civil Procedure has been modeled upon Section 473 of the California Code of Civil Procedure gives special significance to the decisions of the California Courts in their interpretation of this section. Thus in the official annotations of Rule 60(b), the advisory committee states that this section is based upon Section 473 of the California Code of Civil Procedure. Having this in mind, we refer to the case of *People v. Norris,* 144 Cal. 422, in which case a judgment was entered against a defendant by default on May 26, 1896, and the motion to set this judgment aside was made several years thereafter on June 27, 1902. The principal ground for setting aside the judgment urged upon the Court was that the affidavit for order of publication of summons was defective in not showing due diligence on the part of plaintiff as to his inquiry of the whereabouts of the defendant and that the publication of the order for a period of only four weeks was insufficient and not in conformity with the statute.

In that case the Court pointed out that, notwithstanding certain defects in the affidavit, the default judgment was valid on its face, so that no evidence dehors the record was admissible to impeach it.

The Court based its ruling upon the different effect attributed to a collateral attack on the judgment as compared to direct attack. A motion made within the time limit prescribed by Section 473 of the California Code of Civil Procedure would have been a direct attack on the judgment not impeded or prevented by

a plea of the *res adjudicata* effect of the judgment, because it could not have been *res adjudicata* since the law specifically allows a period of time after entry of judgment to move to set it aside. However, a motion to set aside the judgment *after* the expiration of the statutory period of attack must be treated as a collateral attack. The Court says, at page 424, supra:

> "The rule is different in cases of direct attack on a judgment by appeal or motion under Section 473 of the Code of Civil Procedure or otherwise in the line of proceedings in the case. But though an attack of the kind now before us may in one sense of the term be said to be direct, it is in the technical sense to be regarded as collateral —that is, a proceeding aside from or outside of the regular proceeding in the case. Or if we should prefer a different definition, then we must hold that the same rule applies to direct attacks of this kind as to collateral attacks."

See also:

Irwin v. Scriber, 18 Cal. 499;
In re Griffith, 84 Cal. 107, 110;
Crouch v. H. L. Miller & Co., 169 Cal. 341;
Associated Oil Co. v. Mullin, 110 Cal. App. 385, 389.

We refer further to the recent case of *Washko v. Stewart* (1941), 44 Cal. App. (2d) 311 at 317:

> "We have no hesitancy to say that because of the lapse of time between the entry of default judgment and the application by the defendant, Binkert, for relief therefrom, the court was with-

out jurisdiction to set aside such judgment of default * * * Undoubtedly if Binkert was not served with summons he was absolutely within his right in moving to have the judgment set aside, because he was thereby in violation of a fundamental principle, deprived of his property without due process of law and this right he possessed irrespective of Sections 473 and 473a of the Code of Civil Procedure. However, his right to invoke the aid of the court through a motion made in the action itself, is conditioned upon his making such motion within a reasonable time. By an unbroken line of judicial decisions it is established as the law of this State that a motion such as the one we are here concerned with may not be made beyond the time limit specified in Section 473a of the Code of Civil Procedure for making similar motions under that section (Smith v. Jones, 174 Cal. 513). Therefore, the motion, not having been made within one year after the rendition of the judgment, the court was without authority to grant the relief sought herein (citing cases). When the ordained period of time within which to make such a motion has expired, the aggrieved party has his remedy in a separate suit in equity."

See also:

Smith v. Jones, 174 Cal. 513, 517;

Smith v. Bratman, 174 Cal. 518, 520.

In this connection we quote the following statement from 15 *Cal. Jur.* 47, Sec. 139:

"And a motion to set aside the judgment, not made within the period required by law, though in some of the early cases erroneously held and

treated as a direct attack, is aside from or outside the regular proceeding in the case and is a collateral attack, or at least governed by the rules applied to collateral attacks."

(2) DEFECTS IN AN AFFIDAVIT FOR THE PUBLICATION OF SUMMONS WHICH CONCERN THE MODE OF PROOF DO NOT MAKE THE JUDGMENT SUBJECT TO COLLATERAL ATTACK.

The principal ground for vacating the judgment urged by Appellee is based on her contention that Herrington's affidavit for the order of publication of summons (Tr. page 46) was largely hearsay. Without now discussing the contents of that affidavit, we submit that the question whether an affidavit is made on hearsay concerns the mode of proof and not the question whether the material facts are stated in the affidavit.

The United States Supreme Court has held in two decisions that defects of an affidavit for publication of summons, if such defects concern the mode of proof, do not render the judgment subject to collateral attack. In the case of *Pennoyer v. Neff,* 95 U. S. 714, 24 L. ed. 565, the United States Supreme Court passed on the question whether the defects in an affidavit made to obtain an Order of Publication, and in an affidavit by which the publication was proved, were sufficient to render the judgment a nullity and to permit of its collateral attack. The lower Court had so held and its reasoning was disapproved and reversed. The Supreme Court said at page 720 of the decision, page 568, 24 L. ed.:

"The court below did not consider that an attachment of the property was essential to its

> jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the Order of Publication was obtained, and in the affidavit by which the publication was proved. There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of the opinion that, inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the court, or judge, defects in such affidavits can only be taken advantage of on appeal or by some other direct proceeding and cannot be urged to impeach the judgment collaterally * * *
>
> If therefore we were confined to the ruling of the court below upon the defects in the affidavit mentioned, we should be unable to uphold its decision."

The opinion of the Supreme Court in *Pennoyer v. Neff,* supra, does not expressly indicate the character of the defects in the affidavit. We do not believe this to be material, since the Court's decision is clear to the effect that mere defects in the affidavit for publication of summons, irrespective of their character, do not make the judgment void on its face and subject to collateral attack. However, it is a fact that, in *Pennoyer v. Neff,* supra, the defect challenged was that the affidavit without giving any specific facts simply stated:

> "The plaintiff being first duly sworn, says: that defendant, Marcus Neff, is a non-resident of this state, that he resides somewhere in California, at

what place affiant knows not and he cannot be found within this State."

The foregoing facts appear in the Circuit Court's decision in *Pennoyer v. Neff,* supra, 17 Fed. Cas. 1273, and this decision was disapproved by the Supreme Court upon the ground above mentioned.

Since in *Pennoyer v. Neff* the lower Court had based its decision declaring the judgment void on the defects in the affidavit, the question whether the judgment was a nullity on account of those defects was squarely an issue in the case. The decision on that issue is therefore a binding precedent.

See

Florida C. R. Co. v. Schulte, 103 U. S. 118, 26 L. ed. 327.

Also,

Union P. R. Co. v. Mason City Ft. D. R. Co., 199 U. S. 160 at page 166, 50 L. ed. 134 at page 137.

We further refer to the case of *Thompson v. Thompson,* 226 U. S. 551 at page 565, 57 L. ed. 347, which is likewise directly in point. In that case the validity of a divorce decree of a Virginia Court was in issue. On appeal to the Supreme Court one of the reasons alleged for the invalidity of the decree was the fact that the affidavit on which the order granting publication of summons was based had been made upon information and belief. The Court first discussed whether under the Virginia law affidavits based upon information and belief could be used as a foun-

dation for an order for publication of summons and found the use of such an affidavit in conformity with the Virginia practice.

The Court then considered whether the judgment was void as *coram non judice* and subject to collateral attack even if under the State law an affidavit on information and belief was insufficient and defective proof of the facts required for an order granting publication of summons. The language of the Supreme Court on which we rely in the *Thompson v. Thompson* case, supra, is as follows:

> "But, were it otherwise (meaning an assumption that under Virginia law an affidavit based upon information and belief for said purpose was defective), it seems well settled that where the affidavit used as a basis for an order of publication is defective, not in omitting to state the material fact, but in the mode of stating it, or in the degree of proof, the resulting judgment, even though erroneous, and therefore voidable, by direct attack, can not be said to be coram non judice and therefore void on its face." (The statement in parentheses is ours.)

Following the foregoing citation from the case, the Court cites a line of authorities from many different jurisdictions but no authority from Virginia. The citation of authorities from other jurisdictions by the Supreme Court evidently is due to the fact that whether or not the judgment should be held void on its face for the foregoing reasons is a matter which the Court decided under general principles of law applicable to the writ of *coram non judice* and the

nullity of judgments, irrespective of the construction of the local state law.

The reasoning of the Court, although an alternative ground of the decision, is nevertheless a controlling authority, because where two reasons are given by the Court the Supreme Court of the United States has decided that both are controlling and neither can be considered as mere dictum.

See

United States v. Title Insurance & Trust Co., 265 U. S. 472 at page 486, 68 L. ed. 1110 at page 1114.

Therefore, relying on *Pennoyer v. Neff* and *Thompson v. Thompson,* supra, we contend the United States Supreme Court does not consider a judgment void on its face because of defects in the affidavit on which the order for publication of summons is based, if such defects do not consist of the omission of material facts to be shown for the obtaining of such order, but affect only the mode of proof.

The decisions of the United States Supreme Court in other cases as in *Bronson v. Schulten,* supra; *United States v. Mayer,* supra, and *Phillips v. Negley,* supra, have determined the conditions under which a Federal Court can disregard its own judgment within very narrow limits, and the case at bar does not fall within such limits.

We desire to emphasize the fact that in both cases cited, *Pennoyer v. Neff* and *Thompson v. Thompson,* the judgments were default judgments, so that the

decision of the Court as to the effect of such judgments refers to the Court's power to set aside default judgments or to grant relief therefrom.

(3) THE PLAINTIFFS HAVE THE RIGHT AT ANY TIME TO AMEND THE PROOF OF FACTS SUBMITTED FOR AN ORDER OF PUBLICATION.

Our previous discussion of the United States Supreme Court's decisions, holding that defects of an affidavit for a publication of summons do not make the judgment a nullity and subject to collateral attack, was based on the contention of Appellee that the affidavit of Herrington contained such defects, but we did not thereby admit that Herrington's affidavit was defective. Since Appellee by her motion called our attention to certain portions of that affidavit which she claimed were hearsay and which could be corrected by furnishing better proof, we moved the District Court for the privilege of implementing Herrington's affidavit by filing the affidavits of Leo K. Gold and James P. Lavelle. (Tr. page 78 et seq.)

It is well settled that amendments of an affidavit of the type in question, relating to the mode of proof as distinguished from the omission of the statement of material facts, can be filed at any time. Before going into the argument on this point we desire to refer again to the case of *Thompson v. Thompson,* supra, which lays down the distinction between the omission of a statement of material facts and the mode of stating such material facts or the degree of proof furnished for them. The Appellee could not and did not attack Herrington's affidavit for the

omission of material facts required in an affidavit for publication of summons on the ground of due diligence, nor upon the ground of concealment. Appellee's attack of Herrington's affidavit was based on the ground that he had stated too many facts therein on information and belief, so that the sufficiency of the mode of proof of the material facts was questioned by Appellee. In answer to Appellee's motion and before the hearing upon that motion, we moved the District Court for permission to file Leo K. Gold's affidavit and the affidavit of the Deputy United States Marshal, James P. Lavelle, to supplement and fill in further proof by direct testimony of those who participated in the acts concerning certain facts stated in Herrington's affidavit.

In our motion we cited certain decisions of the California Courts to the effect that such amended proof can be furnished at any time. We here refer to those decisions cited as authorities in connection with our motion (Tr. page 79):

City of Salinas v. Luke Kow Lee, 217 Cal. 252;
Bley v. Dessin, 31 Cal. App. (2d) 338;
Re Spiers, 32 Cal. App. (2d) 124;
Alpha Stores Ltd. v. You Bet Min. Co., 18 Cal. App. (2d) 252;
Herman v. Santee, 103 Cal. 519.

In the *City of Salinas* case, supra, the service of summons was by publication and the point of attack was that the affidavit of publication, which constituted part of the judgment roll, indicated that the summons had been published for "one month" instead

of the statutory "two months". To overcome this pertinent deficiency the Court permitted the filing of an amended affidavit of publication, stating that the summons had in fact been published for the statutory period of two months.

The principle set forth in the *City of Salinas* case is identical with that urged in the present case, namely, that the proof required as to one step of the service, and which constituted part of the entire service of process, being challenged as insufficient, further proof was submitted to the Court as to the facts which were in existence at the time the Court made its order for publication of summons in the case at bar. In this case, as in the case just cited, it was intended to file the amended proof in order to "show the judgment entered was not without jurisdiction and never was void".

See

City of Salinas v. Luke Kow Lee, supra, page 255,

citing

Herman v. Santee, supra.

In that same case, in discussing the problem, the Court at page 255 of the decision, cites from *Freeman on Judgments* at page 370, Section 193, the following:

> "As a general rule, an officer who has made a return of process will be permitted to amend such return at any time. If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is

omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the proof of service of process does not consist of the return of an officer, the like rule prevails. *Thus, if a summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and when so filed it will support the judgment as if filed before its entry.*" (The italics are ours.)

The same passage from *Freeman on Judgments* is likewise cited with approval in *Herman v. Santee,* 103 Cal. 519 at page 523. See also *Allison v. Thomas,* 72 Cal. 562.

We refer also to *Freeman on Judgments,* 5th Ed., page 370, Section 193, from which the passage cited by the Court in the foregoing cases appears, and we cite from that author the following:

"A very important part of the judgment roll is that containing evidence of *service of process or the taking of such other steps as are necessary to give the court jurisdiction of the person of the defendant;* and it may happen that this part has been omitted from the roll, or has never been filed in court at all, or as filed and incorporated in the roll is defective, and not sufficient to sustain the jurisdiction of the court, when at-

> tacked on appeal or by motion to set it aside, or even when assailed in a collateral action or proceeding. Then the question is whether the omission may be supplied, or the error corrected, and if so, by what means." (The italics are ours.)

The purpose of this citation from *Freeman,* supra, is to show that the California cases are not limited solely to the proof of service of process, but that amendments of proof are permitted as to all steps in connection with the service of process, which would include further proof of diligent search. The problem in our case is entirely identical as to all parts of the judgment roll "containing evidence of the service of process, or the taking of such other steps as are necessary to give the Court jurisdiction over the person of the defendant." One of those steps is the affidavit to be filed showing the inquiry which has to be diligently made as to the defendant's whereabouts. Freeman who was extensively quoted by the California Courts makes no distinction between evidence furnished as to that step and any other step connected with service of process, both actual and constructive.

We therefore submit that the above citations from California cases are conclusive on the point whether or not a judgment is void depends upon the existence of the facts giving the Court jurisdiction as of the time of the making of the order or judgment challenged. In the instant case the Court undoubtedly had jurisdiction if the facts stated in Herrington's affidavit are true and existed at the time the Court made its order for publication. Therefore, assuming

for the sake of this argument that certain of the facts were defectively stated as being hearsay in Herrington's affidavit, plaintiffs can now amend the proof of the existence of those facts by now filing the affidavits of Gold and the Deputy United States Marshal. A judgment can be void only for lack of jurisdiction, and if the Court in truth and in fact at the time of the rendering of its judgment had jurisdiction, the plaintiffs who had to show the jurisdictional facts should not be barred from amending their proof of these facts whether the former proof be defective or not.

In our motion for permission to file the supplementary affidavits above referred to, we relied on Rule 4(h) of the Rules of Civil Procedure, and in amplification of this reference we refer to 28 *U. S. C. A.,* Sections 767 and 777.

The Federal Courts, in construing these sections, have interpreted them to be applicable to the amendment of affidavits filed in attachment and garnishment proceedings and affidavits in support of process. We refer to the cases of *Erstein v. Rothschild* (C. C. Mich. 1884), 22 Fed. 61, and *Booth v. Denike* (C. C. Tex. 1894), 65 Fed. 43.

We also direct the Court's attention to the case of *Mexican Cent. R. Co. v. Duthie,* 189 U. S. 76, 47 L. ed. 715, where after judgment an amendment of the pleadings to give the Court jurisdiction was permitted.

In the case of *Booth v. Denike,* supra, it might be noted that the laws of Texas did not allow an amendment of an affidavit of the type permitted to be

amended under Section 777 of the Judicial Code, but nevertheless the Court held that under the Federal statutes it would allow such an amendment and said, after the citation of Section 777:

> "It seems clear that the last clause of Section 954, Revised Statutes (another citation of 28 U. S. C. A. 777), expressly confers upon the courts the power to permit parties to amend any defect *in the process or pleadings in furtherance of justice.*" (The parentheses and italics are ours.)

In *Dobie on Federal Procedure,* 1st Edition, that author at page 598, in discussing 28 U. S. C. A., Section 777, states:

> "This statute accomplishing admirable procedural forms in the federal court is at the same time a statute of amendments, permitting a wide discretion as to the amendment of writs, processes and pleadings, and also a statute of jeofails, which prevents abatements, arrestings, quashings, or reversals for defects, of form as distinguished from real defects of substance. As a remedial statute it must be given a generous and liberal interpretation in accordance with its scope and spirit."

(4) IN A COLLATERAL ATTACK, THE RECITALS IN THE JUDGMENT ARE BINDING AND CONCLUSIVE AS TO THE FACT OF SERVICE.

The judgment in this case reads in part as follows (Tr. page 67):

> "The defendant, Grace Appleton McKey, sued herein upon her statutory liability as a stockholder in Woodlawn Trust & Savings Bank, an Illinois banking corporation, having been duly

> and regularly served with summons and having failed to appear, plead or otherwise defend against the complaint of plaintiffs on file herein within the time allowed by law and the said summons, which time has not been enlarged; and the default of said defendant having been duly entered, upon application of plaintiffs to the clerk for judgment, and upon affidavit filed showing the amount due, etc."

We refer to *Ballard v. Hunter,* 204 U. S. 241, 51 L. ed. 461, wherein it appears that a recital in a decree for the sale of lands for unpaid levee taxes that the non-resident defendants were "severally constructively summoned by publication * * * proof of which has been previously filed herein" is conclusive as against a collateral attack based on the objection that there was no sufficient proof of publication of the warning order or notice filed or produced in Court when the decree was made.

We further refer to the following California authorities to the same effect.

In the case of *Kaufman v. California Mining Syn., etc.,* 16 Cal. (2d) 90 (1940), a collateral attack was made on a judgment on the ground of certain alleged defects in the affidavits on file relating to the service of summons. Such service was effected by two methods: First, by service on the Secretary of State under Section 406a of the California Civil Code; and, second, by publication under Sections 412 and 413 of the Code of Civil Procedure. The Court upheld the judgment and relied on the recitals contained therein, saying, at page 93:

"In the present case it appears from the judgment in the other action that oral and documentary evidence was introduced and that the trial court there made its findings with respect to the validity of the service of process and the entry of the default. It does not affirmatively appear that these findings were based solely upon any particular document or documents relating to service of summons, and under these circumstances the presumptions in favor of the validity of the judgment make said findings conclusive upon collateral attack even though there may have been defects in some of the documents constituting part of the judgment roll and relating to the service of summons.

"In *Hahn v. Kelly,* supra, at page 431, it was said: 'But if the judgment for proof of service refers generally to a paper or papers on file, or to a summons and sheriff's return thereon without specifying any particular paper, summons or return, and if there be found on file papers showing a defective and void service, and nothing further appears, the law to support the judgment would presume that the court had other sufficient proof of service than that which remains on file; and it would not in that case appear affirmatively from the record that the recitals in the judgment were untrue. The recitals would therefore be conclusive proof of service, but if the judgment recites a due service of process without specifying how the service was made or referring to any paper as proof of it, the recital is *conclusive on the parties in a collateral proceeding.* * * *.' "

(The italics are ours.)

See also *Musser v. Fitting,* 26 Cal. App 746, at page 751, cited with approval in the *Kaufmann v. Cali-*

fornia Mining, etc. Syn. case, supra, and *City of Salinas v. Lee,* supra, where the Court said, at page 255:

> "However, even in the absence of the amended affidavit showing proper service, we would be disinclined to agree with the appellant's contention that the judgment is void on its face and therefore amenable to a motion to vacate made more than four years after its entry. Having been made long after the expiration of the period prescribed in Section 473 of the Code of Civil Procedure, such motion is governed by the rules applicable to collateral attack and must therefore be presented and determined upon the judgment roll alone. (Citing cases.) This being so, every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it. The judgment here assailed declares that 'the default of the defendant has been duly and regularly entered in this cause in accordance with the law and the order of this court.' This jurisdictional recital in the judgment constitutes a part of the judgment roll. It does not appear that said recital was at all based upon the original and deficient affidavit of publication. It may well be that prior to or at the same time of the entry of judgment it was made to appear to the trial court by other means that due publication of summons has been had. It will therefore be presumed in support of the judgment, and in conformity with the above cited cases, that proof other than the original affidavit was introduced satisfying the court below of the fact of due and proper service of the defendant and of the regularity of the default."

(5) HERRINGTON'S AFFIDAVIT (Tr. page 46) WAS SUFFICIENT UNDER CALIFORNIA PRACTICE TO SUSTAIN THE ORDER FOR PUBLICATION OF SUMMONS.

The California Courts have distinguished between defects in affidavits which are fatal on direct attack and defects in affidavits which are fatal on collateral attack.

In this connection see *City of Salinas v. Lee,* supra, at page 256, and the citation from that decision set forth herein. The distinction was clearly described in the case of *Forbes v. Hyde,* 31 Cal. 342, where the Court said at page 348:

> "There is a marked distinction between an affidavit which presents some evidence on a vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and inconclusive testimony, but there being some appreciable evidence of a legal character which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it. He may be wholly and egregiously wrong in his conclusion upon the weight of the evidence, but he has jurisdiction to act upon it and his action is simply erroneous. His order would in such case be reversed on appeal. But, as there was jurisdiction to act until reversed, or attacked by some direct proceeding to annul it, the order and judgment based upon it would be valid. Such a judgment could not be collaterally attacked."

The above passage was quoted with approval in *Ligare v. California S. R. R. Co.,* 76 Cal. 610. In that case the Court comments on the facts stated in the affidavit for publication of summons. We quote that part of the decision in full from page 612 in order to compare the facts set forth in the affidavit in that case with the facts set forth in Herrington's affidavit in this case.

At page 612 the Court says:

> "The affidavit in question first states that certain defendants, among whom is plaintiff here, 'have been sought for to obtain service of summons thereon, but after diligent search and inquiry cannot be found within the State.' It then goes on to show what kind of search and inquiry have been made, viz., that the affiant 'has made inquiry of all persons from whom he could expect to obtain information as to the residence of said defendants.' It is not expressly stated what was the result of these inquiries. But the statement must be read in connection with what preceded it, viz., that after inquiry the said defendants 'cannot be found within the state.' And so reading it we think it is to be inferred that the inquiries were fruitless. The affidavit then goes on to state that 'a summons and alias summonses' had been placed in the hands of the sheriff of San Diego (which was where the property was situated) with instructions to serve it, and that he had made return that the defendants could not be found in his county, and that 'alias summonses' had been placed in the hands of the sheriffs of San Francisco, Los Angeles, Santa Clara, San Bernardino, Alameda, Humboldt, Yolo, Sacramento and others,' with instructions to make

> service, but that 'they have all returned said summonses with return either indorsed thereon or written responses that they have made diligent inquiry and search within their counties, and cannot find any of said defendants herein mentioned'."

The foregoing affidavit was held to be sufficient and not subject to collateral attack.

In *Rue v. Quinn* (137 Cal. 651) at page 656, the Court says:

> "Whether upon a direct attack upon the judgment by an appeal therefrom within the time limited by statute, the order for such service could be reviewed upon the ground that the evidence was insufficient to justify the finding of due diligence, does not rise in the present case and need not be determined. In *Kahn v. Matthai,* 115 Cal. 689, service by publication was directed upon the ground that the defendant was seeking to conceal himself to avoid the service of the summons, and upon a direct appeal from the judgment it was held that the affidavit did not have any tendency to show that he was concealing himself. The present motion, however, was not made until after the time for an appeal from the judgment had expired."

It was there held that the affidavit containing hearsay was sufficient as against collateral attack and the Court at page 657 said:

> "From the nature of the question to be determined the evidence thereon must to a very great extent be hearsay. * * *"

Omitting everything in Herrington's affidavit referring to his correspondence with the process server Gold, there still remains an affidavit which is very similar (although in much greater detail) to the affidavit in the *Ligare* case. In his affidavit he states in detail that he placed the summons in the hands of the United States Marshal in Los Angeles, setting forth the instructions given to the United States Marshal, and that all search made by the Marshal was futile, and after numerous attempts to serve process the Marshal returned the summons. Then the affidavit states (Tr. p. 57), as a fact and not on information and belief, "that affiant and said attorneys have made a diligent search for said defendant and have made inquiries of each and every person whom they could expect or had any reason to believe they would receive information as to the whereabouts of said defendant, that affiant and said attorneys do not know the present whereabouts of said defendant and cannot learn her present whereabouts * * *." These statements alone are entirely sufficient to uphold the affidavit under the rule laid down in the *Ligare* case.

(6) APPELLEE HAS MADE NO PROOF THAT WITH DUE DILIGENCE SHE COULD HAVE BEEN FOUND IN THE STATE OF CALIFORNIA OR THAT SHE DID NOT CONCEAL HERSELF TO AVOID THE SERVICE OF PROCESS.

The affidavit which Appellee executed in support of her motion (Tr. page 76) states only generalities which do not specifically claim that any of the facts stated in Herrington's affidavit and in the certificates of the Deputy United States Marshal are incorrect or untrue. These statements in her affidavits are so broad

that they do not lead anywhere to nullify the proof furnished by Appellants for both facts, namely, that Appellee after due diligence could not be found within the state and that she concealed herself in order to avoid service.

(7) A DEFENDANT WHO CONCEALED HERSELF TO AVOID SERVICE IS ESTOPPED FROM CLAIMING DEFECTS IN THE SERVICE BY PUBLICATION.

The District Court, in its order for publication of summons (Tr. page 60), stated as one of the grounds for publication of summons "that said defendant has been and now is concealing herself to avoid the service of said process."

That defendant conceals herself to avoid service implies knowledge of the pendency of the action. In fact, Appellee's relative, defendant Kathryn Riddell (Tr. page 49), had been served with subpoena in the same action on December 11, 1936 (Tr. pages 40-41) and final decree *pro confesso* had been entered against her on March 30, 1937. (Tr. page 67.)

Actual knowledge of the pendency of an action in which service by publication was made precludes the defendant from obtaining relief from a default judgment rendered on such service even if motion is made within the statutory period.

Boland v. All Persons, 160 Cal. 486;
Hiltbrand v. Hiltbrand, 218 Cal. 321.

These California cases demonstrate that a defendant who had concealed herself to avoid service would even within the statutory period be estopped from moving to set aside a default judgment.

We submit that a defendant who has concealed herself to avoid service is estopped from seeking any relief based upon improper service by publication.

See:

Collins v. Streitz (1936), 47 Ariz. 146, 54 P. (2d) 264 (appeal dismissed 298 U. S. 640, 80 L. ed. 1373).

(8) THE OTHER POINTS URGED BY APPELLEE IN HER MOTION DID NOT WARRANT THE COURT'S ACTION VACATING THE DEFAULT JUDGMENT.

(a) The order of publication is valid without directing service by mail where the defendant is a resident of the state who after due diligence cannot be found within the state and likewise where such defendant conceals himself to avoid service of summons.

The mailing of summons is prescribed in Section 413 of the California Code of Civil Procedure where the order for publication of summons is made against a defendant who is a non-resident or is absent from the state. (See *Rickeston v. Richardson,* 26 Cal. 149.)

In the present case, however, Appellee admits that she was a resident of the state and the order of publication was applied for because after due diligence she could not be found within the state, being a resident of the state, and because she concealed herself to avoid service of summons.

In cases of this type the order for publication of summons is valid without directing the mailing of summons in addition to publication. The Court in the case of *Ligare v. California S. R. R. Co.,* supra, says at page 614:

"It is only in the first two mentioned cases (where the defendant resides out of the state or where he has departed from the state) that Section 413 requires the order to direct the depositing in the post office, and consequently it is only in such cases that the affidavit is required to state whether the defendant's residence is known to affiant * * * The cases in which the deposit is to be made are distinctly specified and the court ought not to extend the requirements to other cases." (The statement in parentheses is ours.)

(b) The District Court had jurisdiction because the amount involved was in excess of the jurisdictional amount.

Whether the jurisdictional amount was present or not is a factor which cannot make the judgment a nullity because the presence of the jurisdictional amount is a quasi-jurisdictional fact only.

See:

Noble v. Union River Logging Co., supra, and *Stoll v. Gottlieb,* supra.

At the time of her motion it was therefore too late for Appellee to urge this point. However, we maintain that the District Court had jurisdiction, as the jurisdictional amount involved was in excess of $3000.

This is a representative suit brought by plaintiffs, creditors of the Woodlawn Trust and Savings Bank in their representative capacity for the benefit of all creditors of said bank against several defendant stockholders. The Appellants' claims in the aggregate exceed $3000. The sum sought to be recovered from the

Appellee, McKey, alone was found by the judgment of this Court, to far exceed the minimum jurisdictional amount.

The only jurisdictional question, therefore, involved is whether the claims of the plaintiffs and all creditors represented in the suit can be totaled to make up the required jurisdictional amount.

In the case of *Handley v. Stutz,* 137 U. S. 366, 34 L. ed. 706, a representative suit in the nature of a creditor's bill was brought on behalf of all of the creditors of a corporation against the corporation and its stockholders. The bill was not founded upon a direct liability, but upon the theory that the sums due to the corporation from the stockholders on their unpaid subscription to stock ought to be paid by them to the corporation as a trust fund to be distributed among the plaintiffs and the other creditors of the corporation.

The claims of the individual plaintiffs, each taken individually, were less than the jurisdictional amount, and less than the amount necessary to support the jurisdiction of the Supreme Court on appeal. The Court allowed the claims of the plaintiffs to be totaled, and on page 708 said:

> "The sums alleged to be due from the corporation to the original plaintiffs amounting to more than $2,000.00, the Circuit Court had jurisdiction of the case and authority to administer and distribute the amount due from the individual defendants to the corporation for unpaid subscriptions to stock, as a trust fund for the benefit of all the creditors of the corporation. * * *

"The trust fund so administered and ordered to be distributed by the Circuit Court amounting to much more than $5,000.00, the appellate jurisdiction of this court is not affected by the fact that the amounts decreed to some of the creditors are less than that sum. It is immaterial to the Appellants how the amounts should be distributed, and (which is more decisive) such a bill as this would not have been filed by one creditor in his own behalf only, and the case does not fall under that class in which creditors who might have sued severally join in one bill for convenience and to save expense. This court, therefore, has jurisdiction of the whole appeal according to the rule affirmed in *Gibson v. Shufeld,* 122 U. S. 27, and the cases there collected."

See, also,

Shields v. Thomas, 17 How. 3, 15 L. ed. 93.

The Supreme Court, in thus arriving at the result that the claims can be aggregated, stresses three factors:

1. That it was immaterial to the defendants how the sums decreed to be paid by them should be distributed.

2. That such a bill could not have been filed by one creditor in his own behalf only.

3. That the case does not come under the class in which creditors who might have sued severally join in one bill for convenience and to save expense.

It has been definitely decided under the Illinois law that a suit of the type here brought is a representative suit brought by one of a class against one or more defendants for the benefit of the plaintiff class, and to collect a common fund for the plaintiff creditors.

The Illinois statute set out in paragraph VIII of the complaint (Tr. page 18), chapter 16a, Section 11, of the Illinois State Bar Statutes, provides:

> "When any banking association, organized under this act shall have gone into liquidation under the provisions of this section of the Act, the individual liability of the shareholders provided for by section six (6) of this act may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank or banking association may have been located or established."

It will be noted from the foregoing that the statute itself specifies that the suit is a representative suit.

We refer to the recent case of *Heine v. Degen* (1936), 362 Ill. 357, wherein the Supreme Court of Illinois held that a suit brought by certain creditors of an insolvent bank against the stockholders was a class suit on behalf of the collective body of all the creditors of the bank, and that the names of the creditors who were not plaintiffs had not to appear on the complaint, because they were considered to be represented by the

plaintiffs and to be bound by the decision of the Court, without their names appearing on the complaint.

In *Babka Plastering Co. v. City State Bank of Chicago* (1931), 264 Ill. App. 142, the Court said at page 151:

> "It is true these courts (meaning the courts of last resort in different jurisdictions) have not been of the same opinion. However, the generally accepted rules are that the fund created by the statute is in the nature of a security for the common benefit of the creditors." (The statement in parentheses is ours.)

In the *Babka* case the Court ruled that the creditor of the bank who brings suit acts in a representative capacity for the benefit of all creditors, and that all creditors are bound by said proceedings.

It therefore appears that all of the factors mentioned in *Handley v. Stutz,* supra, a United States Supreme Court case, are present in the instant case, because the Illinois law sanctions a suit by a creditor or group of creditors in a representative capacity for the benefit of all creditors against stockholders or a group of stockholders for the recovery of a fund to be collected and prorated among all creditors of an insolvent bank, the mode of distribution being immaterial to the defendants.

There is a very recent federal authority which is directly in point and entitled to special consideration. in view of the fact that the Federal Court of the Northern District of Illinois there passed on the pertinent statutory and case law of Illinois. We re-

fer to the case of *Reconstruction Finance Co. v. Central Republic Trust Co.* (1935), 11 Fed. Supp. 976, affirmed in 102 Fed. (2d) 304. In that case the Court points out that if the creditors were remitted to their remedy at law the creditor who first sued would be entitled to priority over a creditor suing subsequently but who obtained judgment first, and that each creditor would have a distinct group of stockholders answerable to him. In view of the interweaving claims and liabilities the Court draws the conclusion that each creditor is entitled to have the creditors' claims apportioned in such a way that the equitable rule that the claim of each creditor shall be allocated so as to impinge the least upon the claims of other creditors will be observed. Therefore the Court concluded that equity requires that the amounts for which the stockholders are separately liable should be brought together in one fund in order that the rights of the creditors therein may be equitably adjusted. Basing its conclusion on the foregoing, the Court says at page 985:

> "If the foregoing ruling as to the grounds for equity jurisdiction is well founded, the jurisdictional objection of those stockholders whose stock is of par value of $3,000 or less must fail. The amount in controversy is not measured by the claim against each particular stockholder. It is the amount to be collected and apportioned among the stockholders (citing cases). The plaintiff under both the general equity practice and Equity Rule 38 (28 U. S. C. A. following Section 723) is entitled to maintain this suit on its own behalf and on behalf of all other creditors of the bank."

See, also,

Brusselback v. Cago Corporation, 85 Fed. (2d) 20 at 23.

(c) Suit against appellee could be brought in the northern district where other defendants resided, although appellee resided in the southern district of the state.

The action was properly brought in the United States District Court for the Northern District of California. It will be noted from the Marshal's returns on the subpoena (Tr. pages 34, 38 et seq.) that all the defendants were either residents of the Northern or of the Southern Districts of California. The instant case was brought within the purview of *Judicial Code,* Section 52, amended 28 *U. S. C. A.* 113, which provides as follows:

> "When a state contains more than one district, every suit not of a local nature in the district court thereof, against a single defendant, must be brought in the district where he resides, but if there are two or more defendants residing in different districts of the state, it may be brought in either district, and a duplicate writ may be issued against the defendants directed to the Marshal of any other district in which any other defendant resides."

The United States Supreme Court has passed upon this provision in *Petri v. Creelman Lumber Company,* 199 U. S. 487, 50 L. ed. 281, where prior acts of Congress, particularly the Special Act of March 2, 1887, relating to the division of the State of Illinois into judicial districts, are discussed. Referring to the language of that special act, which was substantially the

same as the language of the present act, the Court says, at page 495:

> "The text making this provision is free from ambiguity and, if its plain import be followed, is decisive."

Nowhere in its discussion of this provision does the Court indicate that a distinction should be drawn between cases in which the suit is brought against defendants with joint liability and actions against defendants who are severally liable.

We desire however to comment on the difference in wording in the text with the provisions of the Judicial Code, Section 51(b) amended (28 U. S. C. A. 112), and Section 52 of the Judicial Code, supra.

In Section 51, subsection (b), the United States are granted the privilege to bring suit "where there be more than one defendant in any district whereof any one of the defendants, being a necessary party, or being jointly, or jointly and severally liable, is an inhabitant". If Section 52 had been intended to cover only the cases where the defendants are jointly liable, undoubtedly the same language would have been used as in Section 51(b). The comparison of both sections makes it obvious that if several defendants, residing in different districts of the same state may be joined as defendants, a suit so joining them can be brought in either district.

As discussed above, the instant suit is a representative suit brought by the plaintiffs for a trust fund for the benefit of all creditors, whether joined or not

joined in the action, and against all defendants as stockholders of the bank. In this connection we again refer to the case of *Reconstruction Finance Co. v. Central Republic Trust Co.,* supra. There the Court has even, for purposes of determining the jurisdictional amount, allowed the aggregation of the sums owed by various defendant stockholders of an Illinois bank. The Court held that the stockholders' liability under the Illinois law was of such nature that the various defendants could be joined together not merely for reasons of practical expediency and to save expense, but because their liabilities were interwoven with each other to such a degree that the amounts owed by them should be aggregated to make up the jurisdictional amount.

The purpose of the present Section 52 of the Judicial Code (28 U. S. C. A. 113) has been discussed in the recent case of *Melvin Lloyd Co. v. Stonite Products Co.,* 119 Fed. (2d) 883, and has been determined to the effect that the sole purpose of this section was to preserve to the plaintiff, after division of a state into judicial districts, the same right to bring one suit against any number of residents of that state even though they might happen to live in different districts. In other words, for all purposes of venue, the division of the state into different districts shall be disregarded if plaintiff desires to bring the suit against defendants, some of whom reside in one district and the others in another district of the same state.

We agree with Appellee that the mere adding of a defendant cannot create jurisdiction in any case.

However, the Courts, in construing Section 52 of the Judicial Code, supra, have set up a different test than Appellee's test of joint liability of defendants. The test which the Courts have applied is whether the party residing in the district of the Court is merely a nominal and unnecessary party as distinguished from a real party in interest.

Baltimore and Ohio R. Co. v. Board of Public Works, 17 Fed. Supp. 170;

Nakken Patents Corp. v. Westinghouse Electric and Mfg. Co., 21 Fed. Supp. 336.

In our case the defendants in Northern California were just as liable as stockholders as Appellee residing in Los Angeles, so that all of them were real parties in interest.

We refer to the case of *Skagit County v. Northern Pacific Railway Co.,* 61 Fed. (2d) 638, 642, where the Court took jurisdiction when there was no joint liability of the various defendants, but where the issues were identical in all cases and as to all defendants.

See, also,

Smith v. Merrill, 81 Fed. (2d) 609.

IV.

THE DISTRICT COURT HAD NO JURISDICTION TO QUASH SERVICE OF SUMMONS AND ITS ORDER TO THAT EFFECT WAS IN ERROR.

When the judgment became final, the District Court lost jurisdiction of the case and therefore the Court could not quash service of summons.

Bronson v. Schulten, supra;

United States v. Mayer, supra.

Moreover, the order of the Court is erroneous, inconsistent and ambiguous, in that the Court at the same time quashed service of summons and yet ordered Appellee to file an answer. By ordering her to file an answer the Court expressed its opinion that the Appellee was properly before the Court. If the Appellee was properly before the Court, the quashing of former service of summons was an idle act, because plaintiff was not obliged to serve summons again, and the necessity of again serving summons is the only effect incident upon an order quashing service.

V.

APPELLEE BY MAKING HER MOTION TO DISMISS THE COMPLAINT HEREIN, BY PLEADING MATTERS CONCERNING THE MERITS OF THE CASE AND THE COURT'S JURISDICTION OF THE SUBJECT MATTER, VOLUNTARILY SUBMITTED HER PERSON TO THE JURISDICTION OF THE DISTRICT COURT AND WAIVED THE RIGHT TO RELY ON THE DEFENSE OF IMPROPER SERVICE.

Appellee did not move to vacate the judgment. She moved to have the service of summons quashed and

plaintiff's action dismissed. She based her motion on various grounds, among them the following (Tr. page 70):

> "To dismiss the action as to this moving defendant on the grounds:
>
> (a) That the action is barred as to her by the statute of limitations applicable, to-wit: Section 337 or Section 338 of the Code of Civil Procedure of the State of California, in that it appears from the complaint that more than four (4) years elapsed between the accrual of the alleged liability and the filing of this action.
>
> (b) That this court has no jurisdiction over the cause or causes set out in the bill of complaint, in that as alleged the matter in controversy does not in any cause of action alleged herein exceed the sum of $3,000.00."

In alleging that the action was barred as to her by the statute of limitations, Appellee made a plea on the merits of the case, and by alleging that the Court had no jurisdiction for lack of the jurisdictional amount, Appellee pleaded lack of jurisdiction of the subject matter. Both pleas are fatal to her plea of lack of jurisdiction over her person. In setting up both grounds above referred to, Appellee made a general appearance and was thereafter in no position to question the service of process or to urge the vacating of the judgment on the ground that she had not been properly served with summons and that the Court had not obtained jurisdiction of her person.

In the recent case of *Raps v. Raps,* 20 Cal. (2d) 382, it was said that an appearance in Court of an attorney for the executor of a deceased party for the

purpose of challenging the jurisdiction of the Court to entertain a motion to vacate a judgment on the ground of want of jurisdiction over the subject matter constituted a general appearance by the personal representative, even though objection to the jurisdiction over the person was simultaneously interposed. The Court (at page 385) cited from the case of *Olcese v. Justice's Court,* 156 Cal. 82, the following:

> "* * * Here is one reason for the well settled rule that if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only and must keep out for all purposes, except to make that objection. Another reason equally valid is that if such defendant shall ask for any relief other than that addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary whereby, if the determination of the court be in his favor, he may avail himself of it, while if it be against him he may fall back upon his plea of lack of jurisdiction of the person. So it is well settled that if a defendant under such circumstances raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons."

We likewise cite the case of *Security Loan & Trust Co. v. Boston & South Riverside Fruit Co.,* 126 Cal. 418, where it has been held that a motion to set aside a default judgment on the grounds of no valid service of process, and that the complaint did not state a cause

of action, submitted the defendant to the jurisdiction of the Court over his person.

CONCLUSION.

Appellee has failed to move within the period prescribed by Rules 55 (c) and 60 (b) of the Federal Rules of Civil Procedure. She attacks the judgment collaterally. In such an attack Appellee cannot be heard on any of the grounds to which she points for the invalidity of the judgment, because none of them would make the judgment a nullity. Moreover all jurisdictional facts which are required were actually present and complied with at the time when the judgment was entered.

Appellants' motion to file supplementary affidavits in order to amend the mode of proof as to the facts prerequisite for the publication of service could not be denied by the District Court without abuse of discretion.

The District Court lacked jurisdiction to quash service upon collateral attack after the judgment had become final, and its order quashing service and directing Appellee to file an answer are inconsistent and ambiguous.

Appellee by basing her motion on a plea to the merits on the defense of the statute of limitations and lack of jurisdiction of the Court on the subject matter entered a general appearance and waived the right to challenge the Court's jurisdiction of her person and therefore her motion to quash service of

summons, and if it can be considered as having been made, her motion to vacate the judgment, were improperly granted by the District Court.

We therefore submit that for the reasons set forth in this brief the District Court was in error in vacating the judgment, granting Appellee's motion to quash service, and denying Appellants' motion to permit the filing of the affidavit of Leo K. Gold and James P. Lavelle; and we respectfully request that this Court reverse those portions of the order of the District Court.

Dated, San Francisco,
May 3, 1943.

Respectfully submitted,
DINKELSPIEL & DINKELSPIEL,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

STATUTES INVOLVED.

Rules of Civil Procedure for the District Courts of the United States:

Rule 4(h): *Amendment.* At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

Rule 7(b): *Motions and Other Papers.*

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

Rule 55(c): *Setting Aside Default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b): *Mistake; Inadvertence; Surprise; Excusable Neglect.* On motion the court, upon such

terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, §118, a judgment obtained against a defendant not actually personally notified.

28 U. S. C. A. 767:

Amendment of Process. Any district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues. (R. S. §948.)

28 U. S. C. A. 777:

Defects of form; Amendments. No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring

specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. (R. S. §954.)

California Code of Civil Procedure:

§412: *Service by Publication: Grounds.* Where the person on whom service is to be made resides out of the State; or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of summons; or is a corporation having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge or justice thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or corporation from any interest therein, such court, judge, or justice, may make an order that the service be made by the publication of the summons * * *

§413: *Order for Publication: Personal service equivalent to publication or deposit in post office: Service complete, when.* The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once each calendar week; but publication against a defendant residing out of the State, or absent therefrom, must not be less than two months, except in proceedings instituted pursuant to the provisions of Chapter IV, Title III, Part III, of this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served at his place of residence * * *

§473: *Pleadings may be amended.* The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

Continuance. When it appears to the satisfaction of the court that such amendment renders it necessary, the court may postpone the trial, and

may, when such postponement will by the amendment be rendered necessary, require, as a condition to the amendment, the payment to the adverse party of such costs as may be just.

Relief from judgment taken by mistake, etc. The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken.

Correction of clerical mistakes in judgments or orders. Setting aside void judgment or order. The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order.